Supreme Court, U.S.
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In the

Supreme Court of the United States

SFW ARECIBO, LTD., and FW ASSOCIATES, LTD.,

Petitioners,

v.

ANGEL D. RODRÍGUEZ, et al.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Court overrule *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* to the extent it requires federal takings claimants to engage in state court litigation to ripen their claims for federal review, where four justices of this Court concluded in *San Remo Hotel v. City and County of San Francisco* that the state litigation rule has no plausible doctrinal basis and has had unanticipated and unacceptable results, including that of totally barring takings litigants from federal courts?

LIST OF PARTIES TO THE ACTION

Plaintiffs/ Petitioners:

SFW Arecibo, Ltd. and FW Associates, Ltd.

Defendants/Respondents:

Angel D. Rodríguez; Wanda Capó; Wanda Marrero; Frederick Muhlach, in his personal and official capacity as a member of the Planning Board of Puerto Rico; Fernando Félix, in his personal and official capacity as a member of the Planning Board of Puerto Rico; and Nelson Vélez, in his personal and official capacity as a member of the Planning Board of Puerto Rico.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Counsel for Petitioners is unaware of any parent corporation for Petitioners or any publicly held corporation owning 10 percent of the stock of the Petitioners.

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PETITION FOR WRIT OF CERTIORARI

SFW ARECIBO, LTD., and FW ASSOCIATES, LTD., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The Opinion on the First Circuit Court of Appeals is reported at 415 F.3d 135 (July 14, 2005); it appears as Exhibit A to the petition. The decision of the Federal District Court for the District of Puerto Rico is not reported; it appears as Exhibit B.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on July 14, 2005. On September 2, 2005, this Court extended the time for filing this Petition until November 12, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for pubic use without just compensation."

STATEMENT OF THE CASE

This case involves a challenge to the rule, articulated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*, 473 U.S. 172, 195 (1985), that a federal takings claimant must litigate a just compensation claim in state court in order to ripen that claim for federal judicial review. This rule generally requires both regulatory and physical takings claims to be filed in a state court as an initial matter.

In last term's decision in *The San Remo Hotel v. City and County of San Francisco*, 125 S. Ct. 2491 (2005), the late Chief Justice William Rehnquist wrote for four justices of this Court in declaring that "[i]n an appropriate case," the Court should "reconsider" the rule that federal takings claimants "must first seek compensation in state courts." *Id.* at 2510 (Rehnquist, C. J., concurring).

In this case, two Puerto Rico property owners (the Property Owners) sued the Puerto Rico Planning Board (Board) for just compensation in federal court when the Board revoked a building permit after significant expenditures were made and foundations laid. The First Circuit Court of Appeals held that *Williamson County* barred the federal takings suit, concluding that the Property Owners' only recourse was to sue the Commonwealth of Puerto Rico in the Commonwealth's own courts. Exhibit A, at 6.

Determined to seek compensation for the frustration of their investment-backed expectations, but concerned about potential bias in local courts in favor of the Commonwealth, the Property Owners now seek to overturn the *Williamson County* rule that on its face requires them to sue in local court prior to filing in federal court, but which in practice absolutely precludes federal review.

A. Facts

SFW Arecibo, Ltd., and FW Associates, Ltd. (the Property Owners), are corporations incorporated under the laws of Delaware. They own interests in a parcel of land situated at the intersection of Commonwealth Roads 2 and 683 in the Municipality of Arecibo, Puerto Rico. The parcel was acquired for the purpose of building a shopping center. *See* Exhibit A, at 2.

In 1996, the Board approved a permit for the shopping center. The permit was valid until December 16, 1998, meaning that "actual and effective construction" had to begin by that date. Under Puerto Rico law, "actual and effective construction means "the commencement of the works of urbanization and the construction of a permanent structure on the land, that is to say, any work done beyond the stage of excavation." *See id.* at 2, n.1. After issuance of the Board-approved permit, regulatory jurisdiction over the Property Owners' project transferred to the Puerto Rico Permits and Regulations Administration (ARPE). *Id.*

The Property Owners requested an extension of the permit from the Board on December 9, 1998, which was denied. Nevertheless, the Property Owners "obtained the relevant permits from the ARPE and began to excavate and lay foundations before the December 16, 1998, deadline for commencement of actual and effective construction." *Id.* at 3. The ARPE determined that the Property Owners had met the construction deadline and therefore continued to issue permits for the next five years. *Id.*

On January 27, 2003, the Property Owners asked the Board to clarify whether the portion of the original permit allowing a "light hardware store" would allow a Home Depot Store. Exhibit B, at 2. The Board declined the request and stated that the Property Owners' permit had expired on December 16, 1998, because they had not begun "actual and

effective construction" by that date. Exhibit A, at 3. The Board then informed ARPE that the original permit had expired and that ARPE had no basis for allowing the shopping center project to proceed. *Id.*

B. Procedure

On July 3, 2003, the Property Owners sought administrative review of the Board's determination in the Puerto Rico Court of App als. That court held that the Board's decision that the Property Owners had not begun "actual and effective construction" was erroneous and illegal under local law. *Id.* The Board appealed the appellate court's judgment to the Puerto Rico Supreme Court and the case is currently pending there.

Two months after filing their action for administrative review in Commonwealth courts, the Property Owners filed an action in federal court under 42 U.S.C. § 1983, seeking damages incurred as a result of the revocation of their permit. *Id.* at 3. Among other claims, the Property Owners alleged that the Board's actions had effected an uncompensated and unconstitutional regulatory taking of their property under the Fifth Amendment. *Id.*

The district court dismissed the federal suit because the Property Owners had failed to exhaust Puerto Rico's post-deprivation remedial procedures. Exhibit B at 4. The First Circuit Court of Appeals then affirmed. *See* Exhibit A. Finding that "[a]dequate [inverse condemnation] procedures for seeking just compensation are available under Puerto Rican law," the Court held that the Property Owners' federal takings claim had to be dismissed under *Williamson County* because the Property Owners "have not sought just compensation through those state law procedures." *Id.* at 3.

As a result of the lower court's decision, the Property Owners are required to prosecute their federal takings claim

against a commonwealth agency in the Commonwealth's own courts, rather than in a federal forum. The Property Owners now petition this Court to overrule the portion of *Williamson County* requiring federal takings claimants to engage in inverse condemnation litigation in a local forum prior to seeking just compensation in federal court.[1]

REASONS FOR GRANTING THE WRIT

On the important issue of federal jurisdiction over federal takings claims, the court below applied a *Williamson County* ripeness barrier that is doctrinally incorrect and the cause of massive jurisdictional confusion, all of which warrant its reconsideration. *See San Remo*, 125 S. Ct. at 2510 (Rehnquist, C. J., concurring).

ARGUMENT

I

THE REQUIREMENT THAT A FEDERAL TAKINGS PLAINTIFF MUST COMPLETE AND LOSE IN STATE COURT LITIGATION TO "RIPEN" A TAKINGS CLAIM FOR FEDERAL ADJUDICATION IS DOCTRINALLY UNSOUND AND UNSUPPORTABLE

In *Williamson County*, this Court stated in dicta that a federal takings claim is "not ripe" and "premature" for federal review until the claimant unsuccessfully seeks just compensation though state procedures. 473 U.S. at 194, 197. This rule has been repeated by this Court and the lower courts

[1] The court below and the parties have understood *Williamson County*'s demand that taking plaintiffs utilize "state" compensation procedures to include procedures of the Commonwealth of Puerto Rico.

as established law. Unfortunately, sometimes a "would-be doctrinal rule or test finds its way into [this Court's] case law" by repetition, despite the absence of any firm doctrinal basis for that rule. *Lingle v. Chevron U.S.A.*, 125 S. Ct. 2074, 2077 (2005). As the late Chief Justice Rehnquist emphasized in *San Remo*, the rule that a federal takings litigant must sue in state court to "ripen" a federal takings claim is a prototypical example of this phenomenon. *San Remo*, 125 S. Ct. at 2508 (Rehnquist, C. J., concurring) ("It is not clear to me that *Williamson County* was correct in demanding that . . . the claimant must seek compensation in state court before bringing a federal takings claim in federal court."). Indeed, when subjected to serious scrutiny (an examination absent in *Williamson County*), it becomes obvious that *Williamson County*'s state procedures rule has no plausible basis.

Williamson County offered three justifications for the state procedures requirement. First, it asserted that the requirement arose from the nature of the Fifth Amendment's Takings Clause and particularly, from the recognition that no federal takings violation can occur until there is a denial of just compensation. This, the Court said, means that a claimant must be denied, and therefore must seek, compensation in state court to ripen a federal takings claim. *Williamson County*, 473 U.S. at 194. The Court buttressed this reasoning with analogies to *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), and *Parratt v. Taylor*, 451 U.S. 527 (1981). These justifications fail easily when reconsidered. *San Remo*, 125 S. Ct. at 2510; *id.* at 2508, n.1 (Rehnquist, C. J., concurring).

A. There Is No Basis for Believing That a State *Court* Must Deny Compensation Before Compensation Can Be Deemed Lacking and a Claim Ripe Under the Federal Takings Clause

The first and most important basis for the state procedures requirement was the Court's understanding that the federal

Takings Clause can be violated only when a state court denies compensation. *See Williamson County*, 473 U.S. at 194. The fundamental principle underlying this conclusion—that an action for a taking exists only if the challenged invasion of private property occurs "without just compensation"—is not controversial, but the additional conclusion that compensation can be deemed lacking only when state court says so, is. *See* Peter A. Buchsbaum, *Should Land Use Be Different? Reflection on* Williamson County Regional Planning Board v. Hamilton Bank, *Takings Sides on Takings Issues*, 473-74 ("[T]his underlying premise [that the government has not acted] illegally until you ask for compensation and then it is denied is, of course, untrue.") (Roberts, ed. 2002); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 72 (1995) ("The language of the Fifth Amendment does not dictate this [state procedures] rule."); Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 694 (2004) ("[T]here is nothing in either logic or the language of the Fifth Amendment that requires municipal nonpayment [of compensation] to be certified by a state court before it is complete.").

Nothing in the text of the Takings Clause requires one to read the "without just compensation" language to mean there shall be no takings "without a state *court* ordering compensation." Buchsbaum, *Takings Sides on Takings Issues*, *supra*, at 473; Berger & Kanner, *Shell Game!*, *supra*, at 696 (The Fifth Amendment "does not say 'nor shall private property be taken for public use without just compensation as finally determined by suing the municipal defendant in state court.'"). Instead, it is just as plausible, and probably more natural, to conclude that compensation is lacking when, at the time of the alleged taking, *the responsible local entity fails to provide it.*

Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 43 (1992) ("It makes little sense to require property owners to seek just compensation from the courts, as opposed to the governmental entity which imposed the regulation.").

And, in fact, this Court has repeatedly recognized over many years that the right to compensation, and the government's duty to pay, accrues at the time of the challenged taking. For instance, in *United States v. Dickinson*, the Court declared: "[T]he land was taken when it was taken and an *obligation to pay for it then arose.*" 331 U.S. 745, 751 (1947) (emphasis added). Then, in the 1980 case of *United States v. Clarke*, the Court repeated that "the usual rule is that the time of the invasion constitutes the act of taking and '[i]t is that event which gives rise to the claim for compensation.'" 445 U.S. 253, 258 (1980) (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)). In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, this Court made clear that the same principles applied in the regulatory takings context. 482 U.S. 304, 315 (1987) ([T]he constitutional right to just compensation accrues as "soon as private property has been taken.").

The text of the Takings Clause is, therefore, at least as amenable to the theory that a property owner is "without just compensation" at the moment the government invades property without a guarantee of such compensation, as it is to *Williamson County*'s idea that compensation is absent only after a state court affirms the lack of compensation. But, if just compensation can be said to be constitutionally absent at the time of the alleged taking, then a federal claim should be ripe at that time, and *Williamson County* is wrong in requiring additional state court litigation. *San Remo*, Brief Amicus Curiae of Elizabeth J,. Neumont, at 8 ("*Williamson County* deviated sharply from the traditional understanding of that

Clause" in "asserting that a property owner's monetary claim under the Just Compensation Clause does not accrue 'until just compensation has been denied by the state judicial system.' ").

The notion that a state court must deny compensation before a claimant can be said to be "without just compensation," is not only unnecessary under the text of the Takings Clause, and inconsistent with this Court's traditional concept of the timing of a just compensation violation, it is also illogical. After all, it is not the state, but the local government, that is being sued for compensation in the typical § 1983 takings action. Berger & Kanner, *Shell Game!*, *supra*, at 695. This too affirms that a claim for compensation should accrue when the *local* government engages in an uncompensated taking, not after a state *court* subsequently denies a claim for compensation.

In short, there is no textual reason for construing the Just Compensation Clause to mandate state court litigation as a matter of federal ripeness. Nor can this requirement be recast as an exhaustion of local remedies principle. *See Patsy v. Board of Regents of Florida*, 457 U.S. 496, 516 (1982) (holding that § 1983 claimants are not required to exhaust state remedies to sue in federal court). This Court should take this case to reconsider the flawed textual basis for hinging takings ripeness on failed state court litigation.

B. *Monsanto*'s Holding That Takings Claims Against the United States Must Occur in the Court of Federal Claims Does Not Support a Rule Requiring State Court Litigation for Ripeness Purposes

The *Williamson County* Court attempted to shore up the state procedures requirement with an analogy to *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986. But this is no sounder than the court's reliance on the text of the Takings Clause.

The *Williamson County* Court declared that *Monsanto* established that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government.'" *Williamson County*, 473 U.S. at 194 (quoting *Monsanto*, 467 U.S. at 1013, 1018, n.21). In the opinion of the *Williamson County* Court, *Monsanto* then held that "takings claims against the Federal Government are premature until the property owner has availed itself of the process [for seeking compensation] provided by the Tucker Act." *Williamson County*, 173 U.S. at 195 (citing *Monsanto*, 467 U.S. at 1016-20). Analogizing to these premises, *Williamson County* concluded that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.*

If one accepts the *Williamson County*'s understanding of *Monsanto*, that case might seem to support the state procedures requirement. But *Monsanto* simply does not stand for the propositions that the *Williamson County* Court claims and consequently, it cannot justify the state litigation requirement.

Unlike *Williamson County*, *Monsanto* did not involve a federal claim for just compensation; it involved a claim for injunctive and declaratory relief. *Monsanto* held that, whether or not the challenged acts caused a taking, the plaintiff could not acquire injunctive relief. As a brief amicus curiae cited in Justice Rehnquist's *San Remo* concurrence aptly explains, *Monsanto*'s rejection of injunctive relief is inapposite to the (*Williamson County*) issue of whether federal just compensation

claims are premature and unripe in federal court prior to state court litigation:

> [T]he [*Monsanto*] company's request for equitable relief was not merely premature, it was not available at all. In other words, there was nothing the company could do to 'ripen' its claims for equitable relief; that claim simply had no merit, period."

San Remo, Brief Amicus Curiae for Elizabeth J. Nuemont, at 12.

The problems with *Williamson County*'s reliance on *Monsanto* go deeper still because *Monsanto* merely held that takings claims against the federal government must be raised as just compensation claims arising under the Tucker Act. This requirement is nothing like requiring takings claimants to file just compensation claims in state court to ripen federal review because the Tucker Act suit is the assertion of a [federal] claim for compensation, not a prerequisite. Accordingly,

> [I]f *Williamson County* were correct that [under Monsanto] a property owner must 'avail itself of the process provided by the Tucker Act' before pursuing its claim for just compensation, then would be the rule that a property owner must essentially bring a Tucker Act suit to bring a Tucker Act suit. In other words, an owner's Tucker Act suit would be 'premature' until the property owner had brought a Tucker Act suit for just compensation. Obviously, this reductio ad absurdum deserves no respect. . . .

San Remo, Brief Amicus Curiae for Elizabeth J. Nuemont, at 12 (quoting *Williamson County*, 173 U.S. at 194).

Because the takings claim in the *Monsanto* case and that in *Williamson County* differed so greatly and because *Monsanto* failed to establish any ripeness prerequisite similar to the state procedures requirement, Monsanto cannot possibly support the

state litigation requirement. This further affirms the propriety of overturning that requirement in this case.

C. The Limited Post-Deprivation Remedy Available in the Procedural Due Process Context Has No Application to Takings Claims

Williamson County's final basis for the state procedures requirement is *Parratt v. Taylor*, 451 U.S. 527, a procedural due process decision. This fares no better than the analogy to *Monsanto*.

In *Parratt*, this Court determined that a prisoner's complaint alleging the negligent loss by prison officials of a hobby kit constituted an actionable "deprivation" of property under 42 U.S.C. § 1983. *Id.* at 544. But it also concluded that there was no constitutional due process violation until the plaintiff took advantage of an adequate post-deprivation remedy provided by the State of Nebraska's tort claims statute. *Id.* at 541.

The *Parratt* Court declared that a "state's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the state fails to provide an adequate post-deprivation for the property loss.'" *Hudson v. Palmer*, 468 U.S. 517, 532, n.12 (1984) (quoting *Parratt*, 451 U.S. at 511). In *Williamson County*, the Court extended this reasoning to just compensation claims to support the state procedures prerequisite. *Williamson County*, 473 U.S. at 195.

There is no logical basis for doing so. *Parratt*'s holding —that no procedural due process violation occurs until the plaintiff utilizes a post-deprivation process—applies only in the context of "a random and unauthorized act by a state employee." *Parratt*, 451 U.S. at 541; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982). Such a random act makes a predeprivation hearing "impossible or impractical."

Williamson County, 473 U.S. at 195. *Parratt*'s post-deprivation remedy requirement is not intended to apply where "deprivation of property is effected pursuant to an established state policy or procedure, [since here] the state could provide predeprivation process." *Williamson County*, 473 U.S. at 195, n.14; *see also Evers v. County of Custer*, 745 F.2d 1196, 1202, n.6 (9th Cir. 1984) ("*Parratt* . . . does not apply to cases in which the deprivation of property is effected pursuant to a state procedure and the government is therefore in a position to provide for predeprivation process.").

The "established policy" exception to *Parratt* renders it irrelevant in the takings context because a regulatory taking of private property is always effected pursuant to an established policy or procedure. *See Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed Cir. 2003):

> A property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.

If interference with private property occurs by a government agent's random act, and without the blessing of established policy, it is a "tort, not a taking." *San Remo*, Amicus Brief of Elizabeth J. Neumont, at 13, n.7.

Since a taking always flows from an established policy, predeprivation process is always possible and it therefore makes no sense to apply *Parratt*'s post-deprivation remedial requirement to takings. *See, e.g, LaSalle National Bank v. County of Lake*, 579 F. Supp. 8, 10-11 (N.D. Ill. 1984) (rejecting a postdeprivation remedy defense to government's refusal to provide sewer service to prospective developers because of "established policy" exception). Not only is predeprivation process possible, it routinely occurs before most

regulatory takings. A local regulatory agency typically conducts hearings resulting in findings and a decision (arguably) depriving a property owner of a protected property interest and (definitely) making no provision for compensation.

Applying *Parratt*'s post-deprivation remedial analysis to takings claims is therefore not just inconsistent with *Parratt*'s premise that predeprivation process must be impossible, it puts federal takings claimants into the unparalleled position of having to go through *both* a predeprivation *and* post-deprivation process to prosecute their claim. Nothing in *Parratt* requires this. In fact, procedural due process doctrine holds that the existence of adequate predeprivation process *prohibits* a procedural due process complaint. *See Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062 (6th Cir. 1984) (dismissing procedural due process claim due to adequacy of utilized predeprivation process).

If a property owner has a complaint after provision of predeprivation process, it is one of a substantive nature. *See Augustine v. Doe*, 740 F.2d 322, 327 (5th Cir. 1984):

> [W]hen a plaintiff alleges that state action has violated an independent substantive right, he asserts that the action itself is unconstitutional. If so, his rights are violated no matter what process precedes, accompanies or follows the unconstitutional action.

This too renders *Parratt*'s post-deprivation remedy inapplicable. *Smith v. City of Fontana*, 818 F.2d 1411, 1415 (9th Cir. 1987):

> Actions which violate . . . specific substantive protections of the Bill of Rights lie outside the scope of *Parratt* because the constitutional violation is complete at the moment the action or deprivation occurs, rather than at the time the state fails to provide requisite procedural safeguards surrounding

> the action. Hence, *Parratt* is inapplicable to alleged violations of one of the substantive provisions of the Bill of Rights.

Since takings claimants can and do receive predeprivation process, but allege the loss of a property right despite such process, *Parratt* should be inapplicable to takings claims whether one looks at the just compensation element through a procedural or substantive lens. *Cf. Tomkins v. Village of Tinley Park*, 566 F. Supp. 70 (N.D. Ill. 1983) (holding *Parratt* inapplicable to a takings claim because plaintiff was asserting a "substantive constitutional guarantee: the right not to have her property seized with the active participation of the government and without just compensation.").

Without its purported basis in *Parratt*, *Monsanto* or the text of the Takings Clause, the state procedures requirement is bereft of any plausible rationale and the Court is justified in revisiting and overruling that requirement. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996) ([T]he Court is not bound by decisions that are "badly reasoned."). That the requirement was adopted in *Williamson County* without adequate briefing, and was entirely unnecessary to *Williamson County*'s holding, further highlights the propriety of eradicating it. *See* 473 U.S. at 194 (deciding that the claims were unripe for lack of final decision prior to articulating and applying the state procedures requirement).

Although *stare decisis* should be respected, it is not inviolable. When a rule is "not correct when it was decided and . . . not correct today," [i]t "ought not to remain as binding precedent." *Lawrence v. Texas*, 539 U.S. 558, 578 (2004). Everything about the state procedures requirement suggests that it was "mistaken." *San Remo*, 125 S. Ct. at 2507 (Rehnquist, C. J., concurring). And the error has, unfortunately, had the unintended effect of creating an unpredictable jurisdictional regime that often banishes plaintiffs and defendants from the

federal courts in contravention of the express purpose of the state procedures rule. The Court should take this case to overrule *Williamson County* to the extent it requires takings claimants to engage in state court litigation to ripen a claim for federal review.

II

THE STATE PROCEDURES REQUIREMENT HAS HAD UNANTICIPATED AND UNACCEPTABLE RESULTS, INCLUDING THAT OF TOTALLY BARRING TAKINGS PLAINTIFFS AND DEFENDANTS FROM FEDERAL COURTS

The state procedures requirement warrants further attention not only because as it aspires to the level of a constitutional ripeness rule without any logical or jurisprudential basis, but also because its flaws have wreaked havoc on the federal jurisdiction framework. Because it is purportedly grounded in ripeness, the state procedures rule tells claimants and courts that a federal takings claim is allowed in federal court after the claimant fails in state court and so ripens the claim. *See DLX, Inc. v. Kentucky*, 381 F.3d 511, 518, n.3 (6th Cir. 2004) (*Williamson County* "clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court."); *Dodd v. Hood River County*, 59 F.3d 852, 860 (9th Cir. 1995) ("We deem it extremely significant that the [*Williamson County*] Court characterized the compensation element as an issue of ripeness. The central concern of ripeness is whether the case involves uncertain or contingent future events that may not occur as anticipated or may not occur at all."). *See also*, Roberts, *Ripeness and Forum Selection*, *supra* note 4, at 39 ("[T]he ripeness label . . . suggests that a claim may be heard in federal court after a state court denies compensation.").

Yet, because *Williamson County*'s concept of ripening by state court litigation conflicts with many traditional jurisdictional concepts, including res judicata, *Rooker-Feldman*, and the right of removal, the state procedures requirement has rendered the law of takings jurisdiction almost unintelligible. *San Remo*, 125 S. Ct. at 2509 (Rehnquist, C. J., concurring).

A. Because of Preclusion Doctrine, The State Procedures Rule Operates in Conflict with Its Own Ripeness Purposes

Perhaps the most long-standing jurisdictional problem arising from *Williamson County* is the conflict between the Full Faith and Credit Act, which incorporates res judicata and collateral estoppel principles, and *Williamson County*'s claim that takings actions ripen for federal review after state court litigation. Res judicata and collateral estoppel are at odds with the rule that failed state litigation matures a takings claim for federal court because such principles generally bar re-litigation of previously adjudicated cases. *See Wilkinson v. Pitkin County Board of County Commissioners*, 142 F.3d 1319, 1325 n.4 (10th Cir. 1998) ("[I]t is difficult to reconcile the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel."); *DLX*, 381 F.3d at 519-21:

> The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*, and one unique to the takings context, as other § 1983 plaintiffs do not have the requirement of filing prior state court actions.

Last term, this Court confronted the clash between the Full Faith and Credit Act and *Williamson County*'s notion that a takings claim is ripe and proper in a federal forum upon completion of state court litigation. This Court held that federal courts could not recognize an exception to res judicata and collateral estoppel principles for takings claims litigated in state court in compliance with *Williamson County*. 125 S. Ct. at

2507. But, in so doing, the *San Remo* Court did not overrule *Williamson County*'s state procedures requirement, did not repudiate its purported ripeness character, or disavow the notion that the requirement was intended to open the federal courthouse doors.

The retention of the state procedures requirement and its flawed ripeness foundation, along with the strict enforcement of preclusion, renders the prevailing federal jurisdictional regime as nonsensical. While *Williamson County* says that litigating a claim in state court is a constitutional means to ripen federal review, *San Remo* says that the Full Faith and Credit Act bars ripened claims from proceeding in a federal forum. While *Williamson County* anticipates that state court litigation will "mature" a claim for federal review, 473 U.S. at 196, preclusion ensures that it always remains immature. Accordingly, as it stands now, federal takings claims are permanently banished to state courts by operation of a rule that holds out state court litigation as a *temporary* step toward a federal forum. *Dodd v. Hood River County*, 59 F.3d at 860 ("We disagree . . . with the notion that *Williamson County* is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment takings plaintiffs . . . ."); Daniel Mandelker, et al., *Federal Land Use Law* 4A-23 (1998) ("The Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants.").

In short, *Williamson County*'s state procedures requirement currently operates in opposition to its own ripeness foundations and purposes. For this reason, federal takings jurisdiction remains incoherent. The Court should take this case to overrule *Williamson County* and thereby bring doctrinal logic and predictability to the field of takings jurisdiction.

B. The State Procedures Rule Generates Additional Jurisdictional Confusion in Combination with the *Rooker-Feldman* Doctrine

The jurisdictional anomalies spawned by the flawed state court litigation requirement do not arise solely in connection with the preclusion principles inherent in the Full Faith and Credit Act. They also occur because *Williamson County*'s state litigation ripeness predicate conflicts with the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine prevents federal district court from entertaining suits "complaining of injuries caused by state court judgments and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 125 S. Ct. 1517, 1521-22 (2005). This principle is difficult to reconcile with *Williamson County*'s claim that takings ripeness requires an adverse state court judgment on a just compensation claim. And, in fact, many federal courts have construed compliance with *Williamson County*'s state litigation requirement to trigger dismissal under *Rooker-Feldman*, rather than ripeness. *See, e.g., Shooting Point, L.L.C. v. Cumming*, 368 F.3d 379 (4th Cir. 2004); *Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487 (6th Cir. 2001) (invoking *Rooker-Feldman* to dismiss takings claims brought after state courts denied just compensation on state law takings claims); *Johnson* v. *City of Shorewood*, 360 F.3d 810 (8th Cir. 2000); *Hill v. Town of Conway*, 193 F.3d 33 (1st Cir. 1999) ([P]laintiff's federal takings claims barred because of prior state court action in which plaintiffs "sought damages for a taking, which damages had been denied by the state court.").

The Eighth Circuit's decision in *Johnson v. City of Shorewood* illustrates. After the *Johnson* plaintiffs lost physical and regulatory takings claims in state court, they sued in federal district court, believing their claims were now ripe under

Williamson County. *Id.* at 815-16. Although the district court dismissed the suit under the preclusion principles of the Full Faith and Credit Act, the Eighth Circuit concluded that *Rooker-Feldman* was the more appropriate basis for the same result. The court explained:

> We believe the problem is more fundamental [than the Full Faith and Credit Act]. To the extent the Johnsons' alleged constitutional injury stems from claims adjudicated in the prior state court judgment, the district court lacked jurisdiction under *Rooker-Feldman* because the Johnsons are essentially challenging the state judgment as inadequate and are "asking the federal court for the same remedy requested in the state court action: just compensation."

Id. at 818-19.

Thus, given *Rooker-Feldman*, the state procedures requirement has none of the ripeness quality ascribed to it by *Williamson County*; the state court process mandated by *Williamson County* simply ends, rather than crystalizes, federal review. *Rooker-Feldman* accordingly reaffirms what preclusion doctrine initially revealed: the still-extant ripeness premises of the state procedures requirement are impotent in the prevailing jurisdictional framework. *See DLX*, 381 F.3d at 517, n.3 (noting if the takings claimant had lost in state court: "[T]he formula adopted by this circuit as applied in our past cases would require *Rooker-Feldman* abstention in evident tension with *Williamson County* . . . which clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court.").

The only purported role for the state procedures requirement sounds in ripeness, and yet, given *Rooker-Feldman* and preclusion doctrine, a takings claimant cannot ripen a claim in any way by complying with the state procedures requirement.

As a result, the current jurisdictional regime for federal takings claims—like the state procedures requirement itself—lacks an intelligible doctrinal basis.

C. Due to the State Procedures Requirement, Courts Are in Confusion on the Propriety of Removing Federal Takings Claims and the Government's Ability to Remove Is Entirely Unpredictable

Williamson County's state litigation ripeness requirement makes federal jurisdiction chaotic for government defendants as well as for plaintiffs because it confuses the defendants' statutory right of removal. Generally speaking, a state court defendant may remove any complaint raising a federal question proper for federal adjudication. 28 U.S.C. § 1441. This has traditionally allowed defendants to remove constitutional claims, including those arising under the Takings Clause of the Fifth Amendment. *See, e.g, Nemmers v. City of Dubuque*, 716 F.2d 1194 (8th Cir. 1983) (adjudicating pre-*Williamson County* takings claim after removal). Yet, because *Williamson County* holds that federal takings cases are unripe until after state court proceedings, and cannot be originally filed in federal court for this reason, removal of takings claims does not seem possible in the post-*Williamson* era under the basic rule. *Cf. City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163 (1997) ("The propriety of removal . . . depends on whether the case *originally could have been filed in federal court.*") (emphasis added).

Nevertheless, some courts have held that defendants *can* remove takings complaints which could not be originally filed in federal court due to lack of prior state court litigation. *See, e.g, Marion County Landfill, Inc. v. Board of County Commissioners of Marion County*, 211 F.R.D. 634 (D. Kan. 2002); *McDonald's Corp. v. City of Norton Shores*, 102 F.

Supp. 2d 431 (W.D. Mich 2000); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173 (D. Kan 1999).

Occasionally, the permitted removal of unripe takings claims "sticks" and results in complete federal adjudication of a claim that should be in state court under *Williamson County*. *See Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998). Often, however, the tension between removal and *Williamson County* results in piecemeal and inefficient litigation. In *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623 (5th Cir. 2003), for instance, a federal district court allowed the government to remove state and federal takings claims. *Id.* at 625. The parties then filed competing motions for summary judgment and the court ruled in favor of the landowner. *Id.* at 625-26. But on appeal, the Fifth Circuit held that the landowner's claims were not ripe and not removable for lack of the state court litigation required by *Williamson County*. *Id.* at 626. The parties were therefore sent back to the state court where the case started and where it would have remained if not for the defendant's confusion about its right to remove a federal takings claim. *Id.*; *see also*, *Reahard v. Lee County*, 30 F.3d 1412, 1414, 1418 (11th Cir. 1994) (remanding removed case to state court for lack of ripeness after five years of litigation).

In still other cases, federal courts reject the defendant's attempted removal of a takings claim on the ground that the claim is unripe and the court lacks jurisdiction for that reason under *Williamson County*. Some courts consider the removal of an unripe takings claim so improper that it warrants an award of fees and costs against the government defendant under 28 U.S.C. § 1447(c). *See Quivira Village LLC v. City of Lake Quivira*, 2004 WL 1701070 (D. Kan., Jul 29, 2004).

Therefore, depending on what jurisdiction one is in, *Williamson County* may either strip a federal takings claim of its removable, federal question character, or have no impact at all. Government defendants and plaintiffs are accordingly

bereft of solid ground when it comes to the propriety of removal. The cause of this situation is *Williamson County*, not the removal statute. By requiring takings plaintiffs to litigate first in state court, without discussing removal and other traditional jurisdictional doctrines, *Williamson County* created a vacuum with respect to how its unique rule interacts with these doctrines. The federal courts have naturally attempted to fill the void. Without further guidance from this Court on the scope and function of *Williamson County*'s state litigation requirement, they have established a contradictory jurisdictional framework, one that makes the right of removal and other basic rules virtually imperceptible.

The impact of the state procedures requirement on takings litigants is indeed "dramatic." *San Remo*, 125 S. Ct. at 2510 (Rehnquist, C. J., concurring). Because state court litigation has always been inconsistent with preclusion and *Rooker-Feldman*, *Williamson County*'s purported ripeness requirement has no ripening effect and instead renders physical and regulatory takings claims unworthy of federal review. *San Remo*, 125 S. Ct. at 2509 (Rehnquist, C. J., concurring). This in turn deprives takings plaintiffs of their Seventh Amendment right to a jury trial. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 694 (1999). Similarly, defendants are deprived of their statutory ability to remove, and defend against, a federal constitutional takings claim in a federal forum.

"No other important right is dealt with in such a shabby manner. One might have thought that all the provisions of the Bill of Rights were entitled to protection in the federal courts. Unfortunately, that will not be the case unless the Court . . . decides to pursue [Chief Justice] Rehnquist's invitation and modifies the Williamson County ripeness test." James W. Ely, Jr., "*Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, Cato Supreme Court Review 39, 68-69 (Mark K. Moller, ed., 2005) The Court

should take this case to revisit and overrule *Williamson County*'s state litigation requirement, and in this way, provide both takings plaintiffs and defendants with a coherent, predictable, and just set of rules pertaining to federal jurisdiction.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: October, 2005.

Respectfully submitted,

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Appendix A1

No. 04-2587

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SFW ARECIBO, LTD. and FW Associates, Ltd.,	)	Heard May 3, 2005
	)	Decided
Plaintiffs, Appellants,	)	July 14, 2005
	)	
v.	)	
	)	
Angel D. RODRÍGUEZ; Wanda Capó; Wanda Marrero; Frederick Muhlach, in his personal and official capacity as a member of the Planning Board of Puerto Rico; Fernando Félix, in his personal and official capacity as a member of the Planning Board of Puerto Rico; and Nelson Vélez, in his personal and official capacity as a member of the Planning Board of Puerto Rico,	)	
	)	
Defendants, Appellees.	)	

* * * *

Before BOUDIN, Chief Judge, LYNCH and LIPEZ, Circuit Judges.

Appendix A2

OPINION

LIPEZ, Circuit Judge.

This appeal arose from a dispute over a land use permit for the development of a shopping center in Arecibo, Puerto Rico. Two real estate developers sued members of the Puerto Rico Planning Board in the United States District Court for the District of Puerto Rico pursuant to 42 U.S.C. § 1983, alleging that the Planning Board, which reviews proposed development projects throughout the Commonwealth, violated various provisions of the United State [sic] Constitution when it erroneously determined that the developers' land use permit had expired without the commencement of "actual and effective construction."[1] The district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The developers filed a timely appeal. Seeing "nothing in the present case to distinguish it sufficiently from the usual land developer's claim under state law to warrant recognition of a federal constitutional question," *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982), we affirm.

I.

The appellants, real estate developers SFW Arecibo Ltd. Partnership and FW Associates Ltd. Partnership ("Developers"), are constructing a shopping center in Arecibo, Puerto Rico. The Planning Board approved a preliminary development plan for the project on August 26, 1996, and issued a land use permit that required the Developers to begin

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[1] Puerto Rico law defines "actual and effective construction"—or, as the parties refer to it, "real and effective construction"—as "the commencement of the works of urbanization and the construction of a permanent structure on the land, that is to say, any work done beyond the stage of excavation." 23 P.R. Laws Ann. § 62o.

actual and effective construction by December 16, 1998. Once the permit was issued, the Developers had to apply to the Puerto Rico Permits and Regulations Administration ("ARPE") for specific construction permits.

On November 16, 1998, the Developers requested that the Planning Board extend the deadline by which actual and effective construction had to begin. The request was denied on December 9, 1998. Nevertheless, the Developers obtained the relevant permits from the ARPE and began to excavate and lay foundations before the December 16, 1998 deadline for commencement of actual and effective construction. The ARPE agreed that the Developers had met the deadline and continued to issue permits for the project.

On January 27, 2003, the Developers requested that the Planning Board clarify whether the original land use permit would allow for the building of a Home Depot store in the shopping center. The Planning Board denied the request for clarification on February 21, 2003, explaining that the land use permit had expired on December 16, 1998 because the Developers had not commenced actual and effective construction by that deadline. The Planning Board also informed the ARPE that the underlying land use permit had expired, and thus that it could no longer issue construction permits for the Developers' project.

On July 3, 2003, the Developers appealed to the Puerto Rico Court of Appeals for administrative review of the Planning Board's decision. The Puerto Rico appellate court sided with the Developers, ruling on August 25, 2004 that the Planning Board's decision was erroneous and that the Board's actions violated the Developers' ownership rights as set forth in the Puerto Rico Constitution. *FW Assocs. v. Junta De Planificación*, No. KLRA-03-00476, 2004 WL 2480859 (P.R. Ct. App. Aug. 25, 2004). The Puerto Rico appellate court's

decision is currently pending before the Puerto Rico Supreme Court.

Not content to limit their claims to the courts of Puerto Rico, the Developers also filed a § 1983 action against members of the Planning Board in federal district court on September 5, 2003. In their federal complaint, the Developers alleged that the Planning Board's erroneous revocation of the land use permit violated their rights under the Takings, Due Process, and Equal Protection Clauses of the federal Constitution.[2] The Planning Board responded by filing a motion to dismiss the complaint for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6).

The Developers failed to reply to the 12(b)(6) motion within the time allotted. Several days after the deadline had passed, the Developers requested an extension of time to file their opposition. On January 12, 2004, the district court denied the request for an extension and deemed the motion to dismiss unopposed. The district court subsequently issued an opinion and order dismissing the case pursuant to Rule 12(b)(6). The court's ruling rested solely on our precedent in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), because that case, in the court's view, "resolved a controversy nearly

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[2] The Fifth Amendment Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This clause applies to the states under the Fourteenth Amendment. *See Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 92 n. 4 (1st Cir. 2003), *cert. denied*, 540 U.S. 1090, 124 S.Ct. 962, 157 L.Ed.2d 795 (2003). The Fourteenth Amendment Due Process and Equal Protection Clauses provide that "[no] State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

identical to the one present in the instant case." *SFW Arecibo, Ltd. v. Rodriguez*, No. 03-1970 (D.P.R. Sept. 22, 2004).

II.

We review a district court's grant of a motion to dismiss *de novo*. *Greene v. Rhode Island*, 398 F.3d 45, 48 (1st Cir. 2005).[3] In so doing, we accept as true the well-pleaded factual allegations of the complaint, drawing all reasonable inferences in the non-movants' favor. *Id.*

A. Takings Claim

The Developers assert that the Planning Board's erroneous determination that their permit expired without the commencement of actual and effective construction amounted to a taking of private property without just compensation, thereby violating the Fifth and Fourteenth Amendments to the United States Constitution. This claim is premature. It is well-settled that "if a State provides an adequate procedure for

[3] Emphasizing that the Developers failed to oppose the motion to dismiss in the district court, the appellees assert that the Developers have waived their substantive claims on appeal. The Developers respond that the district court granted the motion to dismiss based substantially on arguments not raised in the motion itself, and therefore that they could not have been expected to raise the claims in the district court that they advance on appeal. While it is true that the Developers could have raised these claims in a post-judgment motion, we will not treat their failure to do so as a waiver in this case. *See United States v. LaGuardia*, 902 F.2d 1010, 1013 (1st Cir. 1990) (explaining that an appellate court may relax the raise-or-waive rule under certain circumstances). Instead, we will follow the lead of the district court and address the Developers' claims on their merits.

seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Adequate procedures for seeking just compensation are available under Puerto Rico law. *See Deniz v. Mun. of Guaynabo*, 285 F.3d 142, 146-47 (1st Cir. 2002) (concluding that Puerto Rico case law recognizes an inverse condemnation remedy by which property owners can seek just compensation). Because the Developers have not sought just compensation through those state law procedures, their complaint does not state a valid federal takings claim. *See id.* at 149 ("A plaintiff's failure to exhaust the inverse condemnation remedy renders premature a section 1983 damages action predicated upon an alleged takings violation.").

B. Procedural Due Process Claim

To establish a procedural due process claim under § 1983, a plaintiff "must allege first that it has a property interest as defined by state law and, second, that the defendants, acting under color of state law, deprived it of that property interest without constitutionally adequate process." *PFZ Prop.*, 928 F.2d at 30. Here, the Developers assert that the Planning Board violated their procedural due process rights when it determined that the land use permit had expired and revoked it without notice or a hearing. That assertion is misguided. If the Developers have a property interest in the land use permit (we assume *arguendo* that they do), the post-deprivation process available to them under Puerto Rico law is a constitutionally adequate protection for that interest.

The Developers do not challenge the adequacy of the permitting procedures established by Puerto Rico law. Instead, they allege that the Planning Board illegally revoked their land

use permit without jurisdiction to do so. We rejected an analogous due process claim in *PFZ Properties*, explaining that in this context, our focus is on the availability of post-deprivation, rather than pre-deprivation, process:

> When a deprivation of property results from conduct of state officials violative of state law, the Supreme Court has held that failure to provide pre-deprivation process does not violate the Equal Protection Clause. . . . The state is not required to anticipate such violations of its own constitutionally adequate procedures. To hold otherwise would convert every departure from established administrative procedures into a violation of the Fourteenth Amendment, cognizable under § 1983. . . . [T]he only question is whether the post-deprivation process available to [the plaintiff] is adequate.

Id. at 31 (internal citations omitted). We went on to hold that "the combination of administrative and judicial remedies provided by Puerto Rico law is sufficient to meet the requirements of due process." *Id.*

The post-deprivation process that we found adequate in *PFZ Properties* included the right to petition the administrative agency for reconsideration and to seek judicial review in the courts of Puerto Rico. *Id.* The same procedures for review were available in this case. The Developers petitioned the Planning Board to reconsider its ruling. It then sought judicial review before the Puerto Rico Court of Appeals, which ruled in its favor. That ruling is now pending before the Puerto Rico Supreme Court. A holding that the Developers had a federal procedural due process claim on these facts would contravene our case law. *See id.* at 31; *see also Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 40 (1st Cir. 1992).

The Developers nevertheless attempt to distinguish *PFZ Properties* on several grounds, none of which is persuasive. First, they contend that "the plaintiff in [*PFZ Properties*] claimed an entitlement to a construction permit that was never issued and over which the plaintiff never acquired a vested property interest [while] this case deals with permits that were issued and revoked after the Developers had effectively acquired a vested right. This point is inapposite. Although the *PFZ Properties* court was skeptical of the plaintiff's claimed property interest, it assumed *arguendo* that the plaintiffs did have such an interest and that the agency's actions had deprived it of that interest. *See* 928 F.2d at 31. *PFZ Properties* turned not on the nature of the developer's property right, but on the availability of post-deprivation process. *Id.* Nowhere in the opinion did we suggest that the constitutional standard by which we judge the adequacy of post-deprivation relief varies with the strength of the plaintiff's claimed property interest.

The Developers also assert that *PFZ Properties* is distinguishable because here, "the Planning Board could have, should have, and must have provided the Developers with a hearing prior to revoking the land use permit over which they had a vested property right." The logic of this claim is not clear. Even if the Planning Board should have provided the Developers with a hearing in this case (a judgment we do not make), the alleged deprivation of property, as in *PFZ Properties*, "results from conduct of state officials violative of state law." *Id.* The Developers concede as much elsewhere in their brief, acknowledging that "since . . . the Planning Board acted *ultra vires* [when it revoked the permit], there really is no process that could have been afforded to safeguard the Developers' constitutional rights." As in *PFZ Properties*, then, the only question is whether adequate post-deprivation process was available to the plaintiffs. We agree with the district court that adequate post-deprivation process was available here in the form of administrative and judicial review of the Planning

Board's decision. The plaintiffs have not stated a procedural due process claim upon which relief can be granted.

C. Substantive Due Process

Asserting that the Planning Board acted without jurisdiction when it revoked the permit and that it improperly usurped ARPE's jurisdiction by restraining that agency from granting any additional permits,[4] the Developers also claim a violation of their substantive due process rights. This claim, too, is foreclosed by *PFZ Properties* and subsequent case law.

In *PFZ Properties*, we explained the standard for establishing a substantive due process violation in the land use permitting context:

> This Court has repeatedly held . . . that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. Even where state law officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. The doctrine of substantive due process does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or

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[4] According to the Developers, "the Planning Board warned ARPE that it could proceed no further, i.e., that it could not issue further permits, since the Land Use Permit expired on December 16, 1998 without the Developers having engaged in '[actual] and effective' construction."

> action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.

Id. at 31-32 (internal citations and quotation marks omitted) (brackets in original). Although "[w]e have left the door slightly ajar for federal relief in truly horrendous situations, . . . the threshold for establishing the requisite 'abuse of government power' is a high one indeed." *Colon*, 964 F.2d at 45.

The Developers' allegations concerning the Planning Board's determination that the permit expired without the commencement of actual and effective construction do not state a substantive due process violation under this standard. In its strongest form, the Developers' claim is essentially that the Planning Board made an erroneous decision in violation of state law. This claim is indistinguishable from the one we rejected in *PFZ Properties*. *See* 928 F.2d at 32 (holding that "*PFZ*'s allegations that ARPE officials failed to comply with agency regulations or practices in the review and approval process for the construction drawings are not sufficient to support a substantive due process claim"); *see also Licari v. Ferruzzi*, 22 F.3d 344, 349 (1st Cir. 1994) (rejecting a substantive due process claim based on allegations that a town planning board improperly revoked the developer's building permits and delayed processing and approval of an application for an amended permit). We agree with the district court that the plaintiffs have not stated a substantive due process claim upon which relief can be granted.

D. Equal Protection

Finally, the Developers recast the permit revocation as an equal protection violation. Emphasizing that laying a foundation ordinarily qualifies as actual and effective construction, the Developers point out that the Planning Board

determined in this case that the Developers had not commenced actual and effective construction by December 16, 1998 despite the fact that they had begun laying a foundation. The Developers reason that by determining that laying a foundation did not constitute actual and effective construction, the Planning Board "treated them differently than all others who are similarly situated" in contravention of the Fourteenth Amendment Equal Protection Clause. We disagree.

Although a land use dispute may give rise to an equal protection claim in extreme circumstances, *see Colon*, 964 F.2d at 44, such circumstances are not present here. The Developers allege no facts that suggest invidious discrimination based on a prohibited category such as race or sex, nor have they pointed to an egregious procedural irregularity or abuse of power that might constitute a federal equal protection violation. *See id.* They assert only that they were treated differently from other individuals who lay a foundation before a permit deadline for the commencement of actual and effective construction. That allegation, however, "represents nothing more than a claim that [the permitting agency] departed from its own procedures or those provided by Puerto Rico law." *PFZ Props.*, 928 F.2d at 32. Absent facts reflecting more fundamental discrimination, the plaintiffs have not stated a claim under the Equal Protection Clause of the Fourteenth Amendment.

Affirmed.

Appendix B1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

SFW ARECIBO LIMITED PARTNERSHIP S.E., et al.	*	
Plaintiffs	*	
v.	*	**Civil No. 03-1970(SEC)**
ANGEL D. RODRIGUEZ, et als.	*	
Defendants	*	

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OPINION AND ORDER

Pending before the Court is Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Docket #8). Previously, the Court deemed Defendants' motion as unopposed since Plaintiffs failed to reply to said motion within the time allotted by Local Rule 7(b) (Docket #14). After carefully examining Plaintiffs' complaint, Defendants' motion and the applicable law, the motion to dismiss will be **GRANTED**.

Background

On or about August 26, 1996 the Puerto Rico Planning Board approved the "Consulta de Ubicación" number 93-06-1018-JPU for the construction of a shopping center to be located at the intersection of Commonwealth Road No. 2 and 683 at Factor Ward in the Municipality of Arecibo, Puerto Rico. Pursuant to the extensions granted by the Planning Board, said permit was valid through December 16, 1998 at which time the development project had to be undergoing "real and effective"

construction. According to Commonwealth law, once the land use permit is issued, administrative jurisdiction over the project passes to the Puerto Rico Permits and Regulations Administration ("ARPE"). The Planning Board only retains jurisdiction to entertain requests for amendments or variations of the land use permit.

On November 16, 1998 Plaintiff SFW Arecibo requested an extension to the land use permit. Said request was denied by the Planning Board on December 9, 1998. Thereafter, some competitors who opposed the issuance of construction permits for the shopping center requested that ARPE deny said permits. However, ARPE determined that Plaintiff SFW Arecibo had undertaken real and effective construction within the time allotted by law and subsequently proceeded to issue several permits regarding the construction of the shopping center.

On January 27, 2003, Plaintiff SFW Arecibo requested the Planning Board an amendment, variation or clarification to the land use permit issued on August 26, 1996. The request was aimed at clarifying whether the original land use permit which authorized the operation of a "light hardware store" at the site would allow for the building of a Home Depot store. On February 21, 2003 the Planning Board denied the requested amendment, variation or clarification alleging that it lacked jurisdiction over said petition. The Planning Board informed Plaintiffs that the land use permit had expired on December 16, 1998 since Plaintiff SFW Arecibo had not carried out "real and effective" construction within the time granted in the permit. Said determination was made without holding a hearing. Furthermore, on this same date, the Planning Board informed ARPE that it could not issue construction permits since the land use permit had expired. On July 3, 2003, Plaintiffs filed before the Commonwealth's Circuit Court of Appeals a petition for administrative review of the Planning Board's determination.

On September 5, 2003, Plaintiffs filed the above-captioned matter seeking redress under 42 U.S.C. § 1983 and damages under Article 1802 of the Puerto Rico Civil Code for the alleged violation of Plaintiffs' civil rights. Plaintiffs contend that Defendants, all members of the Puerto Rico Planning Board, illegally and without jurisdiction revoked a permit for a land use authorization ("Consulta de Ubicación") for the construction of a shopping center located in the Municipality of Arecibo, Puerto Rico. They aver that this action constitutes an illegal taking in violation of the Due Process and Equal Protection Clauses.

Standard of Review

In assessing whether dismissal for failure to state a claim is appropriate, "the trial court, must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences therefrom in the plaintiff's favor, and determine whether the complaint, so read, limns facts sufficient to justify recovery on any cognizable theory." LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998) (citations omitted). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957), quoted in Davis v. Monroe County Bd. of Education, 119 S. Ct. 1661, 1676 (1999). See also Correa-Martínez v. Arrillaga-Beléndez, 903 F.2d 49, 52 (1st Cir. 1990) (dismissal for failure to state a claim is warranted "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory").

But "[a]lthough this standard is diaphanous, it is not a virtual mirage." Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997) citing Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988). In order to survive a motion to dismiss, "a

complaint must set forth 'factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.'" Id. In judging the sufficiency of a complaint, courts must "differentiate between well-pleaded facts, on the one hand, and 'bald assertions, unsupportable conclusions, periphrastic circumlocution, and the like,' on the other hand; the former must be credited, but the latter can safely be ignored." LaChapelle, 142 F.3d at 508 (quoting Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996)). See also Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999). Courts "will not accept a complainant's unsupported conclusions or interpretations of law." Washington Legal Foundation v. Massachusetts Bar Foundation, 993 F.2d 962, 971 (1st Cir. 1993).

Applicable Law and Analysis

In their motion to dismiss Defendants raise three arguments. First, Defendants contended that the land use permit does not encompass a property interest within the meaning of the Fifth Amendment. Second, that Plaintiffs' claim is time barred since the one year statute of limitation for Section 1983 claims has elapsed. Third, that Plaintiffs' claim is not ripe for adjudication because they have not exhausted administrative remedies as evidenced by their pending case before the Commonwealth's Circuit Court of Appeals. In addition, Co-defendants Fernando Félix Arroyo and Wanda I. Marrero request the dismissal of the claims against them since they were not employed by the Planning Board nor did they take part in decision to deny Plaintiffs' request to amended or clarify the land use permit.

After examining the applicable law, we find that the Court of Appeals for the First Circuit has already addressed and resolved a controversy nearly identical to the one present in the instant case. In PFZ Properties, Inc. V. Rodriguez, 928 F.2d 28

(1st Cir. 1991), the Court held that assuming in *arguendo* that the facts alleged in the complaint were sufficient to establish a property interest over a construction permit, the post deprivation process afforded to the plaintiff under Puerto Rico law was constitutionally adequate and safeguarded the plaintiff's due process rights. In addition, the Court also held that given the absence of any allegation of racial animus, political discrimination or fundamental procedural irregularity, the plaintiff had also failed to state a claim for violations under the equal protection clause. In conclusion, the First Circuit stated that the combination of administrative and judicial remedies provided by Puerto Rico law is sufficient to meet the requirements of due process and the fact that relief from said adverse decision is denied does not affect the adequacy of the process provided. Id. at p. 31.

We find that this case constitutes *stare decisis* since it particularly resolves on point the controversy at hand. In addition, we note that in this case Plaintiffs have not alleged that the procedures established by Puerto Rico law and the Planning Board regulations constitute a violation of the Due Process Clause of the Federal Constitution. Furthermore, Plaintiffs have pending an administrative review before the Commonwealth's Courts. Therefore, following the First Circuit's ruling in PFZ, we find that in the instant case Plaintiffs have not stated a claim upon which relief can be granted and hence, their claim must be dismissed. Accordingly, Defendants' motion is **GRANTED** and the above captioned matter will be **DISMISSED**.

SO ORDERED.

In San Juan, Puerto Rico, this 22nd day of September, 2004.

S/ Salvador E. Casellas

SALVADOR E. CASELLAS
United States District Judge